

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	
PETER J. LABARBERA)	Adversary Proceeding
(Chapter 7 Case <u>94-41588</u>))	Number <u>95-4083</u>
)	
<i>Debtor</i>)	
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)	
ROSA A. RUDOLPH))	
)	
<i>Plaintiff</i>)	
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v.)	
)	
PETER J. LABARBERA)	
)	
<i>Defendant</i>)	

MEMORANDUM AND ORDER

Plaintiff, Rosa A. Rudolph, seeks a determination of the dischargeability of her judgment against the Debtor, Peter J. LaBarbera. Her complaint asserts that she obtained a state court judgment for fraud committed by Debtor that is non-dischargeable under

Section 523(a)(2). Plaintiff contends that Debtor is collaterally estopped from relitigating issues of fraud previously decided. Debtor generally denies the allegations and further asserts that the punitive damage portion of the judgment is dischargeable under Section 523(a)(2). During a pre-trial hearing, Plaintiff orally moved for summary judgment on the issue of dischargeability. This Court has received the state court trial transcript into evidence and allowed the parties an opportunity to brief the issues. This matter constitutes a core proceeding over which this Court has jurisdiction. *See* 28 U.S.C. §157(b)(2)(I). After considering the evidence submitted, as well as the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor, Peter J. LaBarbera, filed a petition for Relief under Chapter 13 on September 2, 1994. The case was converted to a Chapter 7 bankruptcy on April 3, 1995. Plaintiff/Creditor, Rosa Rudolph, filed a Proof of Claim which is based upon a judgment in the Superior Court of Chatham County, Georgia. The Judgment is in the principal amount of \$10,000.00 together with interest at a legal rate from September 19, 1988, in the amount of \$3,289.84, the sum of \$4,526.00 as attorneys' fees, the sum of \$519.20 as expenses of litigation and \$150,000.00 in punitive damages. The Superior Court of Chatham County, Georgia entered the Judgment on June 21, 1991.

The incident giving rise to Plaintiff's claim is briefly summarized as follows.

Creditor, Rosa Rudolph, in response to solicitations by Debtor, contracted with Debtor for approximately \$27,000.00 in improvements to certain residential property. Ms. Rudolph procured the appropriate financing from a bank and delivered a \$10,000 check to Debtor. Debtor promptly deposited the check and "failed to provide such services as promised."¹ Plaintiff sued Debtor seeking compensatory damages for breach of contract, reasonable attorneys' fees and expenses of litigation for Debtor's stubborn and litigious actions, and punitive damages arising from Debtor's fraud pursuant to O.C.G.A. Section 13-4-60. At trial, Debtor conceded the breach of contract and compensatory damages of \$10,000, but contested the issues of attorneys' fees, costs, and punitive damages. The jury rendered a verdict in favor of the Plaintiff on all of the above issues. On June 21, 1991, Judge Frank S. Cheatham, Jr. entered judgment against Debtor.²

¹ Defendant's Brief p. 1.

² "This action having been tried before the court and a jury, and the jury having rendered its verdict f
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Judgment of June 21, 1995.

On July 6, 1995, Plaintiff brought the present adversary proceeding against Debtor alleging that Plaintiff's claim is excepted from discharge. In Count I, she claims that Section 523(a)(2) specifically creates an exception to discharge from any debt for money to the extent obtained by fraud.³ In Count II, she alleges that Debtor's failure to disclose "bird dog" income on his schedules also bars his discharge. Because at this time Plaintiff failed to present any evidence of this additional income, the Motion for Summary Judgment with regard to Count II is denied.

Regarding Count I, Plaintiff contends that the jury which found Debtor liable on all counts in the state court proceeding was specifically charged on the elements of fraud. Thus, because Section 523(a)(2) excepts from discharge "actual fraud," she contends that as a matter of law the judgment is excepted from discharge and Debtor is collaterally estopped from relitigating the issue. Moreover, even if the Court finds issue preclusion inapplicable, she asserts that the transcript provides enough evidence for this Court to make an independent finding of "actual fraud."

In response, Debtor contends that a state court finding of fraud is only *prima facie* evidence that a debt comes within the Section 523(a)(2) exception to

³ At the conclusion of her brief in support of Motion for Summary Judgment, Movant asserts that her claim is also non-dischargeable pursuant to § 523(a)(4) and (6). However, within the complaint itself, Movant only has alleged an exception to discharge under § 523(a)(2). Therefore, unless the complaint is subsequently amended, this Court will only address the matters stated therein.

discharge. Debtor also asserts that numerous courts have held that Section 523(a)(2) does not apply to an award of punitive damage. Thus, Debtor requests that Plaintiff's motion be denied and the judgment discharged.

CONCLUSIONS OF LAW

In accordance with Federal Rule of Civil Procedure (applicable to bankruptcy under Fed.R.Bankr.P. 7056), this Court will grant summary judgment only if "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is material if it might affect the outcome of a proceeding under the governing substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The moving party has the burden of establishing the right of summary judgment, See Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir.1991); See Clark v. Union Mut. Life Ins. Co., 692 F.2d 1370, 1372 (11th Cir.1982), and the court will read the opposing party's pleadings liberally. See Anderson, 477 U.S. at 249, 106 S.Ct. at 2510-11.

In determining whether there is a genuine issue of material fact, the Court must view the evidence in the light most favorable to the party opposing the motion. See Addickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); See Rosen v. Biscayne Yacht and Country Club, Inc., 766 F.2d 482, 484 (11th

Cir.1985). Once a motion is supported by a *prima facie* showing that the moving party is entitled to judgment as a matter of law, the party opposing the motion must go beyond the pleadings and demonstrate that there is a material issue of fact which precludes summary judgment. See Martin v. Commercial Union Ins. Co., 935 F.2d 235, 238 (11th Cir.1991).

This Court will first decide whether collateral estoppel precludes the discharge of Debtor's judgment against him. Essentially, collateral estoppel, or issue preclusion, bars relitigation of issues previously decided in a judicial or administrative proceeding if the party against whom the prior decision is asserted had a "full and fair opportunity" to litigate the issue in an earlier case. See Allen v. McCurry, 449 U.S. 90, 95, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980); United States v. Irvin, 787 F.2d 1506, 1515 (11th Cir.1986); Sorrells Constr. Co. v. Chandler Armentrout & Roebuck, P.C., 214 Ga.App. 193, 193-94, 447 S.E.2d 101 (1994). The purpose of this doctrine is to prevent parties from re-litigating previously decided issues, promote judicial economy, and ensure finality of rendered judgments.

In the present case, Creditor, Rosa A. Rudolph, brought the instant adversary proceeding claiming that the judgment of the state court is excepted from discharge pursuant to 11 U.S.C. Section 523(a)(2). Section 523 provides in pertinent part as follows:

(a) A discharge under section 727, 1141, 1228[a], 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt --

(2) for money, property, services, or an extension, renewal, or refinancing or credit to the extent obtained, by --

(A) false pretenses, a false representation, or *actual fraud*, other than a statement respecting the debtor's or an insider's financial condition;

11 U.S.C. §523(a); (emphasis supplied). In Section 523(a) dischargeability actions, courts recognize the applicability of collateral estoppel. *See Grogan v. Garner*, 498 U.S. 279, 284 n. 11, 111 S.Ct. 654, 658 n.11 112 L.Ed.2d 755 (1991); *Meyer v. Rigdon*, 36 F.3d 1375, 1378 (7th Cir.1994); *In re Davis*, 3 F.3d 113, 114 (5th Cir.1993); *In re Yanks*, 931 F.2d 42, 43 n. 1 (11th Cir.1991). Moreover, according to federal law, if a state court has rendered a prior judgment, then the federal court must apply the collateral estoppel law of that state to determine the judgment's preclusive effect. *See In re St. Laurent*, 991 F.2d 672, 675-76 (11th Cir.1993). Therefore, this Court must apply the law of the State of Georgia in order to determine the preclusive effect of the judgment against Debtor in state court.

Georgia statutory law recognizes the conclusive effect of judgments by

providing as follows:

A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside.

O.C.G.A. §9-12-40. According to Georgia law, for a party to assert the doctrine of collateral estoppel the issue must have been (1) raised in the prior proceeding, (2) actually and fully litigated, (3) decided by a court of competent jurisdiction, and (4) necessary to the final judgment. *See* Boozer v. Higdon, 252 Ga. 276, 278 313 S.E.2d 100, 102 (1984).

Upon review of the evidence I hold that the doctrine of collateral estoppel is inapplicable to the current proceeding. Although the Plaintiff alleged fraud in her state court complaint and received a verdict in her favor, this Court finds the transcript too unclear to discern whether the judgment was rendered on account of "actual fraud" or "constructive fraud." Specifically, Judge Cheatham charged the jury that, "[f]raud may be actual or constructive or both." (Tr. at 132, June 4, 1991.) Because the jury issued a general verdict in favor of the Plaintiff for \$150,000 of punitive damages, the record is insufficient to determine whether the jury found the Debtor guilty of "actual fraud." *See* Matter of Ford, 186 B.R. 312, 319 (Bankr.N.D.Ga. 1995)("If one does not have proof of

debtor's misrepresented intent, then one does not have proof of actual fraud. *Instead, one merely has fraud implied in law, which never will support a finding of non-dischargeability*"); Therefore, Plaintiff's assertion that issue preclusion excepts the judgment from discharge as a matter of law must be denied.

In the alternative, Plaintiff asserts that from the evidence submitted in the form of the state court transcript this Court as a matter of law should grant the Motion for Summary Judgment. As previously mentioned, when considering a motion for summary judgment the Court must view the evidence in the light most favorable to the party opposing the motion. *See Addickes*, 398 U.S. at 157. Additionally, discharge provisions such as 523(a)(2)(A) warrant narrow construction. *See In re Hunter*, 780 F.2d 1577, 1579 (11th Cir.1986). In practice, the creditor bears the burden of establishing non-dischargeability under Section 523(a)(2)(A). *See Id.* at 1579. Specifically, the creditor must establish by a preponderance of the evidence that:

- (1) the debtor made a false representation with the purpose and intention of deceiving the creditor;
- (2) the creditor relied upon the debtor's representation;
- (3) such reliance by the creditor was justifiable;⁴

⁴ In a recently published opinion, the Eleventh Circuit has determined that "justifiable reliance" is a more appropriate standard than "reasonable reliance" to apply within the fraud exception of 523(a)(2)(A). *See In re Vann*, 67 F.3d 277 (11th Cir.1995).

(4) the creditor suffered a loss as a result of that reliance.

See Id. at 1579. During the state court proceeding, Debtor testified that he intended to perform the contract and further that he subcontracted the work to one Dave Douglas. Other evidence did tend to refute Debtor's claim; however, without an opportunity to evaluate the credibility of the witnesses, this Court is unable to find as a matter of summary judgment that the elements of actual fraud were made out. I must therefore rule in favor of Debtor on Plaintiff's Motion for Summary Judgment.⁵

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Motion for Summary Judgment by Rosa Rudolph is DENIED. The Clerk shall assign this case for trial as soon as practicable. At trial the Court will entertain (1) evidence tending to show whether Debtor's fraud meets the elements of actual or only constructive fraud; and (2) evidence in support of Count II of the complaint.

⁵ Within its brief Debtor also asserts that numerous courts have held Section 523(a)(2) inapplicable to punitive damages. However, In re St. Laurent, 991 F.2d 672, is clearly dispositive of this issue (punitive damage awards flowing from the same course of fraudulent conduct necessitating an award of compensatory damages are not dischargeable in bankruptcy under § 523(a)(2)(A)).

Lamar W . Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of January, 1996.